FILE COPY

Supreme Court, U. S.
FILED
APR 26 1946
CHARLES ELMORE CROPLEY
CLERK

No. 630

# In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

*v.*

THOMAS LEE CAUSBY AND WIFE, TINIE CAUSBY

*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

**BRIEF FOR THE UNITED STATES**

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statement | 3 |
| Specification of errors to be urged | 9 |
| Summary of argument | 10 |
| Argument: | |
| I. The Government did not take property of respondents in using the airspace over their land | 17 |
| A. Since the Federal Government has asserted control over the use of airspace by aircraft there was no taking here | 17 |
| B. Respondents did not own the airspace over their land | 21 |
| II. Even if the Government took from respondents airspace owned by them, the damages resulting from noise, lights and fear of accidents cannot be considered in assessing compensation for such a taking | 29 |
| A. Damages resulting from noise, lights and fear of accidents is damnum absque injuria | 30 |
| B. Respondents' claim sounds in tort | 34 |
| C. The so-called "severance damage" rule does not justify the award of damages resulting from noise, lights and fear of accidents | 35 |
| D. In any event, the fear of accidents was not a proper consideration | 43 |
| III. The judgment below is invalid for lack of a finding as to what property interest was taken and whether it was temporary or permanent | 44 |
| A. Essential findings as to the nature of the property taken were not made by the court below | 45 |
| B. The evidence and findings of fact cannot support a conclusion that a permanent easement was taken | 47 |
| IV. The award of $2,000 is not supported by findings of fact or evidence | 49 |
| Conclusion | 54 |
| Appendix | 55 |


692340 46 1

## CITATIONS

Cases:


| | Page |
|---|---|
| *Atchison, T. & S. F. Ry. Co. v. Armstrong*, 71 Kans. 366 | 32 |
| *Bailey v. United States*, 62 C. Cls. 77, certiorari denied, 273 U. S. 751 | 21 |
| *Ball v. New York C. R. Co.*, 229 N. Y. 33 | 32 |
| *Bauman v. Ross*, 167 U. S. 548 | 36, 37 |
| *Bedford v. United States*, 192 U. S. 217 | 30 |
| *Braeburn Alloy Steel Corp. v. United States*, 95 C. Cls. 343 | 31 |
| *Branson v. Reichelderfer*, 65 F. 2d 280 | 49 |
| *Burnham v. Beverly Airways, Inc.*, 311 Mass. 628 | 28 |
| *Cameron v. Civil Aeronautics Board*, 140 F. 2d 482, certiorari denied, 323 U. S. 716 | 17 |
| *Campbell v. United States*, 266 U. S. 368 | 14, 37, 42 |
| *Chesapeake & Ohio Ry. Co. v. Scott*, 197 Ky. 636 | 32 |
| *Chicago, B. & Q. R. Co. v. Galvin*, 238 Fed. 14 | 44 |
| *Chicago, Burlington, Etc. R'd v. Chicago*, 166 U. S. 226 | 13, 37 |
| *City of Little Falls v. State of New York*, 198 App. Div. 488 | 40 |
| *Coleman v. United States*, 181 Fed. 599 | 37 |
| *Commonwealth v. Von Bostecky*, 30 Pa. Dist. & Co. Rep. 137, 1937 U. S. Aviation Reports 1 | 25 |
| *Court of Marion County, W. Va. v. United States*, 53 C. Cls. 120 | 13, 37 |
| *Crocker v. United States*, 240 U. S. 74 | 47 |
| *Cubbins v. Mississippi River Comm'n*, 241 U. S. 351 | 30 |
| *Danforth v. United States*, 308 U. S. 271 | 13, 37, 38 |
| *Delta Air Corp. v. Kersey*, 193 Ga. 862 | 12, 28, 33, 34 |
| *Epworth v. Ludington & N. Ry. Co.*, 230 Mich. 565 | 32 |
| *Fink v. Cleveland C. C. & St. L. Ry Co.*, 181 Ind. 539 | 31 |
| *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251 | 21 |
| *High Bridge Lumber Company v. United States*, 69 Fed. 320 | 13, 37, 41 |
| *Hinman v. Pacific Air Transport*, 84 F. 2d 755, certiorari denied, 300 U. S. 654 | 11, 24 |
| *Horstmann Co. v. United States*, 257 U. S. 138 | 35, 47 |
| *Hughes v. United States*, 230 U. S. 24 | 30 |
| *Jackson v. United States*, 230 U. S. 1 | 30 |
| *Johnson v. United States*, 2 C. Cls. 391 | 49, 50 |
| *Johnson v. United States*, 4 C. Cls. 248 | 50 |
| *Joslin Co. v. Providence*, 262 U. S. 668 | 53 |
| *Karlson v. United States*, 82 F. 2d 330 | 45 |
| *Keokuk & Hamilton Bridge Co. v. United States*, 260 U. S. 125 | 35 |
| *Manigault v. Springs*, 199 U. S. 473 | 30 |
| *Marion &c. Ry. v. United States*, 270 U. S. 280 | 30, 43 |
| *Matter of City of New York (Public Beach)*, 269 N. Y. 64 | 41 |
| *Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786 | 41 |

**Cases—Continued.**


| | Page |
|---|---|
| *Mayor & Council of City of Baltimore v. Himmelfarb*, 192 Atl. 595 | 32 |
| *Meriden v. Zwalinski*, 88 Conn. 427 | 44 |
| *Miller v. United States*, 137 F. 2d 592 | 44 |
| *Mills v. United States*, 46 Fed. 738 | 35 |
| *Mitchell v. United States*, 267 U. S. 341 | 53 |
| *Neiswonger v. Goodyear Tire & Rubber Co.*, 35 F. 2d 761 | 20 |
| *Northwest Airlines v. Minnesota*, 322 U. S. 292 | 20, 22 |
| *Peabody v. United States*, 231 U. S. 530 | 23 |
| *Pennsylvania R. Co. v. Price*, 241 Fed. 250 | 31 |
| *Pickering v. Rudd*, 4 Comp. 219, 171 Eng. Reprt. 70 | 34 |
| *Pope v. United States*, 26 C. Cls. 11 | 50 |
| *Portsmouth Harbor Land & Hotel Co. v. United States*, 64 C. Cls. 572, certiorari denied, 277 U. S. 603 | 23 |
| *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327 | 8, 22, 33 |
| *Pumpelly v. Green Bay Co.*, 13 Wall. 166 | 23 |
| *Richards v. Washington Terminal Co.*, 233 U. S. 546 | 12, 30, 32, 34, 36 |
| *Robertson v. New Orleans & G. N. R. Co.*, 158 Miss. 24 | 32 |
| *Roman Catholic Church of St. Anthony of Padua v. Pennsylvania R. Co.*, 207 Fed. 897 | 31 |
| *Sanders v. Atlantic Coast Line R. R.*, 216 N. C. 312 | 34 |
| *Sanguinetti v. United States*, 264 U. S. 146 | 30, 35, 37 |
| *Schiefelbein v. United States*, 124 F. 2d 945 | 41 |
| *Schillinger v. United States*, 155 U. S. 163 | 35 |
| *Sharp v. United States*, 191 U. S. 341 | 41, 42 |
| *Smith v. New England Aircraft Co., Inc.*, 270 Mass. 511 | 12, 20, 22, 27, 33, 34, 45 |
| *Southern Pacific Co. v. United States*, 266 U. S. 586, affirming 58 C. Cls. 428 | 35 |
| *State Airport Commission v. May*, 51 R. I. 140 | 53 |
| *Swetland v. Curtiss Airports Corporation*, 41 F. 2d 929, modified, 55 F. 2d 201 | 21, 22 |
| *Thompson v. Umberger*, 221 N. C. 178 | 45 |
| *Thrasher v. City of Atlanta*, 178 Ga. 514 | 11, 26 |
| *Transportation Co. v. Chicago*, 99 U. S. 635 | 34 |
| *Tucker v. Iowa City*, 1936 U. S. Av. Rep. 10 | 25 |
| *United States v. Certain Parcels of Land, Etc.*, 55 F. Supp. 257 | 50 |
| *United States v. Certain Parcels of Land in City of Spokane*, 45 F. Supp. 899 | 41 |
| *United States v. Chandler-Dunbar Co.*, 229 U. S. 53 | 21 |
| *United States v. Chicago, B. & Q. R. Co.*, 82 F. 2d 181, certiorari denied, 298 U. S. 689 | 13, 14, 38, 40, 41 |
| *United States v. Chicago, B. & Q. R. Co.*, 90 F. 2d 161, certiorari denied, 302 U. S. 714 | 13, 14, 39, 40, 41 |
| *United States v. Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592 | 21 |

Cases—Continued. Page

*United States* v. *Commodore Park*, 324 U. S. 386 21
*United States* v. *Cress*, 243 U. S. 316 46
*United States* v. *Des Moines County*, 148 F. 2d 448 41
*United States* v. *Entire Floor in Butterick Bldg.*, 54 F. Supp. 258 50
*United States* v. *Esnault-Pelterie*, 299 U. S. 201 47
*United States* v. *General Motors Corp.*, 323 U. S. 373 33, 48
*United States* v. *Grizzard*, 219 U. S. 180 14, 37, 40, 41, 42
*United States* v. *Hinman* (S. D. Cal.) 1940 U. S. Aviation Reports 1 25
*United States* v. *Lynah*, 188 U. S. 445 23, 30
*United States* v. *Meyer*, 113 F. 2d 387, certiorari denied, 311 U. S. 706 37, 39
*United States* v. *Miller*, 317 U. S. 369 35, 38
*United States* v. *Petty Motor Co.*, October Term, 1945, Nos. 77, 83, decided February 25, 1946 18, 33
*United States* v. *Seminole Nation*, 299 U. S. 417 30
*United States* v. *Sponenbarger*, 308 U. S. 256 33
*United States* v. *Wabasha-Nelson Bridge Co.*, 83 F. 2d 852 14, 39, 40, 41
*United States* v. *Welch*, 217 U. S. 333 23
*United States* v. *Wells*, 283 U. S. 102 30
*United States* v. *W[illegible] River Power Co.*, 324 U. S. 499 13
*United States* v. *6.87 Acres of Land, Etc.*, 147 F. 2d 351 30
*United States* v. *357.26 Acres of Land, Etc.*, 55 F. Supp. 161 29, 30, 33
*United States* v. *742.345 Acres of Land, Etc.*, 60 F. Supp. 570 29
*United States* v. *685.2 Acres of Land in Lake County*, 146 F. 2d 998 29
*United States* v. *12,978.28 Acres of Land, Etc.*, 57 F. Supp. 893 29
*United States* v. *17,280 Acres of Land, Etc.*, 57 F. Supp. 745 30
*United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266 39, 43
*United States ex rel. T. V. A.* v. *Welch*, October Term, 1945, Nos. 528, 533, decided March 25, 1946 41
*Warren Township Dist. No. 7, Etc.* v. *City of Detroit*, 308 Mich. 460 33

Statutes.

Act of February 13, 1925, c. 229, sec. 3, 43 Stat. 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752, 28 U. S. C. sec. 288 3
Air Commerce Act of 1926, 44 Stat. 568, as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U. S. C. secs. 171–245, 401–682 10, 18
Military Appropriations Act of 1945 (Act of June 28, 1944, 58 Stat. 573) 14
Judicial Code, sec. 145, 28 U. S. C. sec. 250 35
General Statutes of North Carolina of 1943 35

Miscellaneous:

| | Page |
|---|---|
| Burdick, *Law of Torts* (4th ed., 1926) p. 406 | 34 |
| 14 C. F. R. 60.35–60.354 | 19 |
| 14 C. F. R. Cum. Supp. 60.35–60.355 | 19 |
| 3 Comp. Gen. 234 | 35 |
| 67 Cong. Rec. 9354 | 21 |
| H. Rep. No. 572, 69th Cong., 1st sess., pp. 8, 9–10 | 20, 21 |
| H. Rep. No. 1162, 69th Cong., 1st sess., pp. 12, 14 | 19, 21 |
| Orgel, *Valuation Under Eminent Domain* (1936) | 32, 37 |
| Rhyne, *Airports and the Courts* (Nat. Inst. of Municipal Law Officers, 1944) | 25, 28 |
| Rep. No. 2, 69th Cong., 1st sess., p. 5 | 21 |
| Rep. No. 10, pt. 16, 78th Cong., 2d sess., p. 121 | 48 |

# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 630

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS LEE CAUSBY AND WIFE, TINIE CAUSBY

*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinions of the Court of Claims (R. 11–22) are reported in 60 F. Supp. 751.

### JURISDICTION

The judgment of the Court of Claims was entered on June 4, 1945 (R. 22). A motion by the United States for a new trial was denied on October 1, 1945 (R. 22). The petition for a writ of certiorari was filed on November 29, 1945, and was granted on April 1, 1946 (R. 232). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. sec. 288 (b).

## QUESTIONS PRESENTED

Effective June 1, 1942, the United States leased the Greensboro-High Point, North Carolina, Airport for one year with a right to renew until June 30, 1967, or six months after the end of the present national emergency, whichever should first occur. The lease gave the Government the right to use the airport for requirements of the War Department concurrently with the lessor and its tenants. The plaintiffs in the Court of Claims owned a parcel of land on which they lived and operated a chicken business, some 2,200 feet from the airport. Upon these facts the following questions are presented:

1. Whether the flight of aircraft over plaintiffs' land at a minimum elevation of 83 feet constituted a taking for which recovery may be had under the Tucker Act.

2. If so, whether the effect of the noise and lights of aircraft crossing above the land and the landowners' knowledge that airplane accidents have taken place at or in the vicinity of the airport may be considered in determining compensation to be paid for such taking.

3. Whether the Court of Claims erred in failing to specify what property interest was taken and whether such interest was permanent or temporary.

4. Whether the ultimate conclusion determining compensation to be $2,000 is supported by findings of fact and by substantial evidence.

## STATEMENT

This action was brought by Thomas Causby and his wife to recover $7,035 for the alleged taking of their lands and for damages to their poultry business which was alleged to have resulted from the flight of War Department aircraft over their lands. The facts and the proceedings in the court below may be summarized as follows:

Since 1927 or 1928 there has been an airfield some eight miles from Greensboro, North Carolina (R. 5). During 1939, extensions were made to one or both of the runways of the airfield which run from northeast to southwest and from northwest to southeast and are 4,000 feet and 3,370 feet long, respectively (R. 5–6). In April 1942 the Greensboro-High Point Municipal Airport Authority, which now operates the airport, was activated pursuant to North Carolina statute (R. 5). On May 11, 1942, the Authority executed a lease to the United States for a term ending June 30, 1942, with a provision for renewals until June 30, 1967, or six months after the end of the present national emergency, whichever should first occur (R. 6). The lease gave the United States the right to use the airport "concurrently, jointly and in common with the Lessor and its tenants" (R. 218).

In 1934 the Causbys purchased 2.8 acres in a strip 100 feet wide and 1,200 feet long (R. 4–5). In 1937 improvements were completed consisting

of a six-room dwelling and various outbuildings principally used for a chicken farm (R. 4). The path of glide to the northwest-southeast runway passes directly over the Causby property, the end of the paved runway being 2,220 feet from their barn and 2,275 feet from their house (R. 8). Between the airfield and the Causby property are a 38.04 acre tract owned by the Government and three privately owned tracts comprising 74.62 acres (R. 46–7). The 30 to 1 safe glide angle approved by the Civil Aeronautics Authority passes over the Causby property at a minimum elevation of 83 feet, which is 67 feet above the dwelling, 63 feet above the barn and 18 feet above the highest tree (R. 8).[1]

Plaintiffs and their witnesses testified that while the civilian planes using the airport bothered them somewhat, use of the airport by the Army, particularly by heavy bombers, interfered with their sleep, etc., because of the noise and lights (R. 34–37, 52–53). Plaintiffs claimed that because of the effect of the noise and lights on the chickens, they were forced to go out of the poultry business (R. 38). They also claimed that uneasiness was produced from fear of ac-

[1] The court below described the 30 to 1 glide angle as follows (R. 12):

"This means that there must be no obstruction more than a foot high 30 feet from the end of the runway, and that the height of any obstruction must not exceed $\frac{1}{30}$ of its distance from the end of the runway." This angle of glide is supposed to be safe under the worst conditions."

cidents (R. 39–40, 46–47, 59). Plaintiffs claimed their property was uninhabitable but admitted that, except for a two-month period, they continued to live there (R. 41, 48, 55). The only evidence of value or damages presented by plaintiffs was that the fee value of the property was between $4,700 and $5,700 (R. 25–26, 31–32) and Causby's testimony that the fair value of the abandoned chicken business was $1,000 (R. 38). At least one of plaintiffs' experts admitted the land had increased in value by reason of the airport (R. 30).

The Government introduced evidence that the runway near plaintiffs' property was used only 4% of the time in taking off and 7% in landing (R. 7, 204–208). It also introduced data showing that all military traffic at the airfield represented about 1/3 or less of the entire traffic and that heavy four-motor bombers constituted only 10% of the military traffic (R. 7–8, 204–208). The details of four airplane accidents were given, from which it appeared that two fatal crashes had occurred one mile and two and one-half miles from the Causby property, respectively. The other two accidents were at the airport and consisted of a landing with the plane's wheels up and of an abortive take-off which did no damage either to the plane or to other property (R. 9, 209–213). These facts were incorporated by the court in its findings. In addition, Government experts valued plaintiffs' property between $2,500 and $2,885 (R.

81, 96–98, 113–114) and testified that the airport hazard did not substantially affect the market value (R. 89, 104).

After finding the facts above outlined as to location of the property, the history of the airport, and the use made of it by Army aircraft, the Court of Claims found (Findings 11–12; R. 9–10):

> Since the United States began operations about May 1942, its four-motored heavy Army and Navy bombers, the fighter and certain other planes of the heavier type, in taking off from and landing at this airport, have frequently passed over plaintiffs' property, their house, and chicken houses both day and night and, at times, in considerable numbers rather close together. They come close enough at times to appear to barely miss the tops of trees on the property and at times close enough to the tops of the trees to cause the old leaves on the trees to fly off. The noise so close to the buildings is startling and at night the glare from the planes brightly lights up the immediate area.
>
> The planes became more numerous after the Army began its operations and this situation has been continuous since that date. There is no evidence of an intention to use or of an intention not to use the airport for its heavy bombers after the termination of defendant's lease, other than the fact that defendant has the right to renew

its lease only until six months after the end of the present emergency or until June 30, 1967, whichever date is the earlier.

12. The result of this situation, together with knowledge of the accidents that have occurred, is that the plaintiffs and their family have become nervous and frightened. At night they are frequently deprived of sleep. The peace and comfort of their home are seriously interfered with. Their property, for the same reason, has depreciated in value.

After describing the effect of the planes upon the chickens, the court found (Findings 13–14; R. 10–11):

Plaintiffs finding themselves losing money gave up the chicken business. Chickens that had cost approximately $2.50 each to hatch and raise for production purposes were sold on the market for $1.50 each. This situation had destroyed the use of the property as a commercial chicken farm.

14. The value of plaintiffs' property that was destroyed and the value of the easement taken, together with the damage to the remainder of plaintiffs' property as a result of the taking of the easement, is $2,000.00.

The opinion of the court below stated that a property owner may prohibit any use of the air space above his land "that interferes with his right to light, air, view, or the safe and peaceful occupation and enjoyment of his land" (R. 14).

It held that the instant case is controlled by *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327. It further held that the right to fly over the property at the stated heights had been taken permanently, not temporarily (R. 17). While recognizing that plaintiffs were not entitled to recover the damage to their business, the court concluded (R. 18):

> From all the testimony, we have concluded that the value of the property destroyed and of the easement taken and the damage to plaintiffs' property resulting from the taking of this easement is the sum of $2,000.00. A judgment in the nature of a jury verdict will be rendered for this amount.

Judge Madden dissented on three grounds. First, he took the view that there was no basis for the assumption that the Government's activities at the airport would be carried on permanently. Second, he expressed the opinion that the Government has the right, at least in wartime, to fly its planes through the air-space over an owner's lands when the flights are at a safe distance and no more frequent than in this case. Finally, he thought that, assuming that what the Government did was a legal wrong, there was no taking of plaintiffs' property.

On October 1, 1945, the Court denied the Government's motion for a new trial but added to Finding 14 (*supra*, p. 7) the statement (R. 22):

The date of the taking of the easement was June 1, 1942.

## SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that property had been taken from the plaintiffs.

2. In holding that the damages caused by the noise of aircraft could be considered in determining compensation.

3. In holding that the damages resulting from lights of aircraft could be considered in determining compensation.

4. In holding that the damages claimed to have resulted from fear of aircraft accidents could be considered in determining compensation and in failing to find whether such fear was shared by the public generally, whether it was reasonable, and whether it affected market value.

5. In failing to define what property interest was taken.

6. In failing to find whether such interest was permanent or temporary.

7. In concluding that a permanent interest had been taken, in the absence of evidence to support such a conclusion.

8. In finding and concluding that compensation should be $2,000, in the absence of findings of fact and evidence to support the conclusion.

9. In awarding the value of property "de-

stroyed" without a finding that any property was destroyed.

10. In entering judgment against the United States.

## SUMMARY OF ARGUMENT

### I

The Government's flights over respondents' land have been 18 feet or more above the trees and improvements thereon. There has been no physical invasion of use of the land, nor has there been interference with any prospect of erection of structures or other use of the air space. For several reasons there cannot be liability under the Tucker Act.

A. Since the flights of aircraft conformed to the angle of glide approved for this airport by the Civil Aeronautics Authority, the area involved was within "navigable air space" in which Congress has recognized a public right of freedom of transit in air commerce. Air Commerce Act of 1926, 44 Stat. 568 as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U. S. C. secs. 176 (a), 180, 403. These Acts were a valid exercise of the commerce powers of Congress and the use of such airspace cannot constitute a taking of property within the meaning of the Fifth Amendment, but, at most, there has been incidental damage as a consequence of authorized navigation.

B. The common law maxim that the owner of realty also owns the airspace above his land to

the periphery of the universe is not accurate. While the law as to ownership of airspace is not yet settled, we believe that the correct view is that such space is privately owned only to the extent that it is used by the erection of buildings or other structures. *Hinman* v. *Pacific Air Transport*, 84 F. 2d 755 (C. C. A. 9), certiorari denied, 300 U. S. 654; *Thrasher* v. *City of Atlanta*, 178 Ga. 514. The suggestion of some decisions that there is an arbitrary boundary of privately owned airspace seems unrealistic. In any event, if that boundary is marked by the limits that have been set by the legislature as the area of "navigable air space," that view would not support the decision below since the flights here were within the navigable airspace. Adaptation of the theory of the court below would result in the imposition of a serious financial burden on air transportation.

II

Since respondents were not making any use of the space through which the aircraft flew, the taking of such airspace was merely theoretical. The claim for substantial award rests entirely on the consequence of the noise and lights of the flights and the fear of accidents. For several reasons these elements cannot be considered in determining compensation, assuming that the Government has taken airspace owned by respondents.

A. Consequential damage which is an incidental result of lawful Government action cannot be the basis of compensation under the Fifth Amendment. It is well-settled that the noise, vibration and similar annoyances which result from the normal and non-negligent operation of a railroad and which do not cause special or peculiar damage to an individual different from that suffered by his neighbors is not compensable. *Richards* v. *Washington Terminal Co.*, 233 U. S. 546. For the same reason, similar damages from normal and non-negligent operation of aircraft is *damnum absque injuria*.

B. Even assuming that such damage from noise, lights and fear of accidents might be recovered against private operators, the liability would be in tort, for maintenance of a nuisance or commission of a trespass. Cf. *Delta Air Corporation* v. *Kersey*, 193 Ga. 862; *Smith* v. *New England Aircraft Co.*, 270 Mass. 511. Since the Tucker Act does not embrace tort claims, such damage is not recoverable against the United States.

C. The so-called "severance damage" rule does not justify the award of damages resulting from noise, lights and fear of accidents. The "severance damage" rule is that consideration can be given, in cases where a portion of a tract is taken, to the value arising out of the relation of the part taken to the entire tract. But this does not mean that all damages resulting from the use to which the portion taken is to be put may be con-

sidered. *High Bridge Lumber Company* v. *United States*, 69 Fed. 320 (C. C. A. 6); *Court of Marion County, W. Va.* v. *United States*, 53 C. Cls. 120, 140. It is clear that merely because a small portion of property of little value is taken, damages which would otherwise be consequential or constitute a tort claim, may not be considered in awarding compensation. *United States* v. *Willow River Power Co.*, 324 U. S. 499; *Danforth* v. *United States*, 308 U. S. 271; *Chicago, Burlington, Etc. R'd* v. *Chicago*, 166 U. S. 226. This view is confirmed by the rule that value is determined at the date of taking, since it would have been pure speculation to attempt to determine at that time the damage that might result from the noise and lights of the Government heavy bombers.

The fallacy of the view of "severance damage" taken by the court below appears from *United States* v. *Chicago, B. & Q. R. Co.*, 82 F. 2d 131 (C. C. A. 8); *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161 (C. C. A. 7); and *United States* v. *Wabasha-Nelson Bridge Co.*, 83 F. 2d 852 (C. C. A. 7), where the courts, taking a similar mistaken view of "severance damage", concluded that, in consequence, the words "or damaged" had been added to the Fifth Amendment of the Constitution. The fact that the severance rule, when so applied, means that compensation may be had when property is damaged as well as when it is taken, thus nullifying the principle denying recovery of consequential damages, demonstrates the

misinterpretation of the severance rule. The *Chicago, B. & Q.* and the *Wabasha-Nelson* opinion, all of which dealt with the taking of a portion of a railroad and road easements, represent a failure to appreciate the fact that when such easements are involved, the measure of the value of a segment that has been taken is the expense of restoring the property to its former serviceability. Similarly, when, as in *United States* v. *Grizzard*, 219 U. S. 180, access to land is cut off, the value of an easement of access is necessarily determined by reference to the depreciation in value resulting to the parcel it serves. That the Fifth Amendment has not been amended to require payment of consequential damages is apparent from *Campbell* v. *United States*, 266 U. S. 368, where this Court denied recovery for the damage resulting to the remaining portion of a tract of land of which a part was taken, resulting from the use to which lands taken from others for the same project would be put. So here respondents' damage does not result merely from the use of the airspace over their land but from the use of the space of other lands leading to the airfield.

D. In any event, damages from the alleged fear of accidents was not a proper consideration since there were neither findings nor evidence indicating an actual probability of such damage or a reasonable public apprehension thereof sufficient to affect market value.

## III

The court below did not describe the property taken further than to refer to it as an "easement". Although the majority opinion concluded that a permanent easement was taken, no such finding was made.

A. It is reversible error for the Court of Claims to fail to make findings on all material issues. In this Tucker Act suit, it was essential that the nature of the easement be defined by giving particulars as to frequency of flight, permissible altitude, type of aircraft and the like. Moreover, since statements in the opinion cannot take the place of findings, the failure to specify whether a temporary or a permanent easement was taken was also reversible error.

B. Even if the court had found that a permanent easement was taken, such finding would be invalid for lack of evidence or findings of fact to support it. The court found that there was no evidence of an intention to use the airport after termination of the lease. Absent proof of an intention to use the airspace permanently, the court lacked jurisdiction to award compensation as for a permanent taking. Moreover, the facts contradict the existence of such an intention. The temporary lease was in accord with the Governmental policy during the war to take merely the temporary use and not permanent rights in property which would not be needed after the end of the war emergency.

## IV

The process by which the Court arrived at its award of $2,000 does not appear. However, neither evidence nor findings of fact to support such an award are present. Evidence of both parties was directed at the fee value of the property. If the Government's taking was merely temporary, the proper measure of compensation, assuming that consideration can be given to the effects of the noise, lights and fear of accidents, would be the extent to which rental value was depreciated by the taking.

Even on the theory that there was a permanent taking, the evidence does not support the award since there was no indication as to the extent, if any, to which the fee value had been depreciated. In fact, the evidence indicated that fee value was greater at the time of trial than it was before the Government's activities commenced. Moreover, no attempt was made to limit the award to the effects of Government traffic over respondents' property. Certainly the Government is not obliged to compensate respondents for the effect of flights over other properties or of the effect of the aircraft of others than the Government. Activity of Government aircraft over respondents' property represented about 3% of the total activity at the field.

The loss of the poultry business, which respondents valued at $1,000, obviously cannot support the

$2,000 judgment. Moreover, the Government cannot be charged with liability for the loss of business, and there is no evidence indicating that respondents' land had a special adaptability to the chicken-raising business which enhanced its market value.

## ARGUMENT

### I

### The Government did not take property of respondents in using the airspace over their land

The Civil Aeronautics Board's minimum angle of glide for aircraft passes over the Causby property at an elevation of 83 feet[*] (R. 8). This was 18 feet above the highest tree on respondents' property, 63 feet above their barn and 67 feet above their house. The Government aircraft were at least at this height when they flew over respondents' land. Thus there has been no physical invasion of respondents' property. Nor is there any indication of an intent of respondents to occupy this airspace by the erection of structures. We submit that the holding of the court below that nevertheless there was a taking of property for which the United States was liable under the Tucker Act was erroneous.

A. *Since the Federal Government has asserted control over the use of airspace by aircraft there*

[*] At least where, as here, there are no War Department regulations to the contrary. Army planes are subject to the rules of the Civil Aeronautics Board. *Cameron* v. *Civil Aeronautics Board*, 140 F. 2d 482 (C. C. A. 7), certiorari denied, 323 U. S. 716.

*was no taking here.*—In the Air Commerce Act of 1926, 44 Stat. 568, as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U. S. C. secs. 171–245, 401–682, it was stated that "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space over the United States" (49 U. S. C. sec. 176 (a)). "Navigable airspace" is defined as "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation" (49 U. S. C. sec. 180). It was also stated "There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States" (49 U. S. C. sec. 403).[3]

[3] Air commerce is defined as including "any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce" (49 U. S. C. 401 (3)).

The Civil Aeronautics Board is authorized to prescribe "Air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles." (49 U. S. C. 551 (a) (7)). "Aircraft" is defined as "any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air" (49 U. S. C. 401 (4)).

[4] The North Carolina statutes contain somewhat similar provisions. See Appendix, *infra*, p. 55.

Pursuant to the exercise by Congress of this control over air navigation, regulations were issued which provide generally for a minimum safe altitude of 1,000 feet over congested areas and 500 feet in other cases.[6] No general regulations for take-offs and landings were issued under the Acts, but the managers on the part of the House of Representatives at the joint conference on the air commerce statute had been cognizant that "the minimum safe altitudes of flight * * * would vary with the terrene and location of cities and would coincide with the surface of the land or water at airports." H. Rep. No. 1162, 69th Cong., 1st sess., p. 14. And in the instant case "The safe glide angle for planes landing or taking off at this airport, approved by the Civil Aeronautics Authority, is a 30 to 1 glide angle" (Finding 9, R. 8). The minimum altitudes of aircraft over respondents' property, following the approved glide angle, was 83 feet. Thus, the flight of the aircraft here involved was within the navigable airspace as defined by the statutes and regulations, and such flights were an exercise of the declared right of travel through that airspace.

It has been the general policy of the War Department to acquire avigation easements only when it is necessary to enter upon the land to remove obstacles that interfere with normal and safe

[6] 14 C. F. R. 60.35-60.354; 14 C. F. R. Cum. Supp. 60.35-60.355.

flying or to obtain agreements from the land owners that would prevent them from erecting structures or planting trees that would become a menace to flight safety." No such obstacle, either present or prospective, is involved here. As Mr. Justice Jackson stated in *Northwest Airlines v. Minnesota*, 322 U. S. 292, 303: "Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water." We submit that the statute above cited were a proper exercise of the commerce powers of Congress (*Smith v. New England Aircraft Co.*, 270 Mass. 511, 520–521, 525–526; *Neiswonger v. Goodyear Tire & Rubber Co.*, 35 F. 2d 761 (N.D. Ohio)), and that when, as here, flights are made within the navigable airspace without any physical invasion of the property of landowners, there has been no taking of property but merely incidental damage occurring as

---

Congress was aware that it was exercising the commerce power in enacting the statutes. As stated in H. Rep. No. 572, 89th Cong., 1st sess., p. 10: "The declaration of what constitutes navigable air space is an exercise of the same source of power, the inter-state commerce clause, as that under which Congress has long declared in many acts what constitute navigable or nonnavigable waters. The public right of flight in the navigable air space owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of the adjacent or subjacent soil.

"The whole framework and, in many cases, the very language of the bill may fairly be said to be merely the applica-

a consequence of authorized air navigation. Cf. *United States* v. *Causby*, 328 U. S. 256; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 596–598; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62, 69; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 265; *Baetjer* v. *United States*, 62 Ct. Cl. 77, certiorari denied, 273 U. S. 751.

B. *Respondents did not own the air space over their land.*—It was often stated, at common law, that the ownership of land extended to the periphery of the universe, and this was expressed in the maxim "*Cujus est solum ejus est usque ad coelum*". However, it has been generally agreed since the development of air navigation that this is not true. As Mr. Justice Jackson stated in

---

[illegible] to the transportation of property and [illegible] principle of law long established to [illegible] transportation.

The legislative history also [illegible] recognizing the similarity between air and water [illegible] S. Rep. No. 2-[illegible], 69th Cong., 1st sess., p. 3; H. Rep. No. [illegible], 69th Cong., 1st sess., pp. 9–10.

Military and naval aircraft were intended to be subject to the air traffic rules. H. Rep. No. 572, 69th Cong., 1st sess., p. 5; H. Rep. No. 1162, 69th Cong., 1st sess., p. 12; and in order to protect interstate and foreign air commerce by air traffic rules, it was made to apply whether the aircraft engaged in "commercial or noncommercial or in foreign, interstate or intrastate navigation of the United States, irrespective of whether the aircraft is registered or is navigating in [illegible] waters." H. Rep. No. 1162, 69th Cong., 1st sess., p. 12; see also 67 Cong. Rec. [illegible].

The discussion in *Swetland* v. *Curtiss Airport Corp.*, [illegible] 41 F. 2d 929, 931 (N. D. Ohio), modified, [illegible] F. 2d 201

his concurring opinion in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 302–303:

> The ancient idea that landlordism and sovereignty extend from the center of the world to the periphery of the universe has been modified. Today the landowner no more possesses a vertical control of all the air above him than a shore owner possess horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be "owned" to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use.

See *Southard* v. *Curtiss Airports Corporation*, 11 F. 2d 929, 934–936 (N. D. Ohio), 55 F. 2d 201, 203 (C. C. A. 6).

The decision in *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327, is not, as the court below thought (R. 14–16), controlling here. The right to use airspace for planes and similar purposes without any physical interference with surface uses was not involved nor was it discussed in the opinion. The allegations of the complaint in that case, which were held to be sufficient, claimed that there had been a taking

(C. C. A. 6) is, we believe, based on the erroneous notion that airspace conforming to the safe glide angle is not navigable airspace. Cf. *Smith* v. *New England Aircraft Co. Inc.*, 270 Mass. 511, 526–528.

of the land by the firing of projectiles over it." The Court applied (260 U. S. at p. 329) the principles established in the predecessor case of *Peabody* v. *United States*, 231 U. S. 530. There the Court cited only the decisions in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, *United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Welch*, 217 U. S. 333, to support the proposition that subjection of land in time of peace to the burden of governmental use by firing projectiles at will over it "might well be considered to be a 'taking'" (231 U. S. at p. 538). Thus, the *Portsmouth* case was simply another application of the view established in the *Pumpelly*, *Lynah* and *Welch* cases in all of which the plaintiffs' lands had been permanently flooded, that the destruction of all uses for property constitutes a taking.

The court below held that "there can be no doubt that today a landowner owns the air-space above his land as completely as he does the land itself or the minerals beneath it, at least insofar as it is necessary for his full and complete enjoyment of the land itself" (R. 14). Thus, the court has held, in effect, that the landowner can recover as for a taking, on account of any sub-

---

* After remand the claimant was unable to prove a case, the petition was dismissed (*Portsmouth Harbor Land & Hotel Co.* v. *United States*, 64 C. Cls. 572), and certiorari was denied, *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 277 U. S. 603.

stantial injury caused by aircraft, regardless of the altitude of flight. While purporting to recognize that the common law doctrine "has received substantial modification" (R. 13), the court has applied the alleged rule of the common law, viz., that the landowner can recover for any substantial damage resulting from invasion of the airspace which he owns. We submit that the decisions thereon demonstrate the error of the court below.

In *Hinman* v. *Pacific Air Transport*, 84 F. 2d 755 (C. C. A. 9), certiorari denied, 300 U. S. 654, the court held that the flight of aircraft over land even as low as five feet without interfering with the use of it, was not a trespass. It also stated that it was not legally possible to obtain an easement for use of such airspace by prescription. The court analyzed the rights in airspace as follows (84 F. 2d at p. 758):

> The air, like the sea, is by its nature incapable of private ownership, except in so far as one may actually use it. This principle was announced long ago by Justinian. It is in fact the basis upon which practically all of our so-called water codes are based.
>
> We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This right is not fixed. It varies with our varying needs and is coextensive with them. The owner of land owns as much of the space above him as he uses.

but only so long as he uses it. All that lies beyond belongs to the world.

When it is said that man owns, or may own, to the heavens, that merely means that no one can acquire a right to the space above him that will limit him in whatever use he can make of it as a part of his enjoyment of the land. To this extent his title to the air is paramount. No other person can acquire any title or exclusive right to any space above him.

Any use of such air or space by others which is injurious to his land, or which constitutes an actual interference with his possession or his beneficial use thereof, would be a trespass for which he would have remedy. But any claim of the landowner beyond this cannot find a precedent in law, nor support in reason.

So here, there has been no physical interference with respondents' possession nor with their use of

---

Subsequently, the landowners erected "spite" structures which interfered with normal use of the airfield. The district court enjoined the maintenance of such structures subject, however, to the right of the landowners to show that the erection of structures in excess of height limitations of the injunction was necessary to good faith beneficial use of the property. *United States v. Hinson* (S. D. Calif., 1938), 1940 U. S. Aviation Reports 1. The erection of "spite" structures was similarly enjoined in *Commonwealth v. Vogt-Bostedt*, 30 Pa. Dist. & C. Rep. 137, 1937 U. S. Aviation Reports 1 (Ct. Com. Pl. Dauphin Co., Pa.); *Tuckey v. Iowa City*, 1936 U. S. Av. Rep. 10 (Dist. Ct. Johnson Co., Ia.); see Rhyne, *Airports and the Courts* (Nat. Inst. of Municipal Law Officers, 1944).

the property but simply incidental damage resulting from the noise and lights.

The Supreme Court of Georgia also adopted the view that there are no property rights in unappropriated airspace in *Thrasher* v. *City of Atlanta*, 178 Ga. 514, 528, 531. This was an action to enjoin the operation of an airport as a nuisance, because of the noise created there, the dust blown on plaintiff's property, the danger from falling aircraft and the annoyance of low flights by airplanes above a home. Plaintiff's bill was dismissed on demurrer in the lower court, but this ruling was reversed by the Supreme Court of Georgia on the ground that a cause of action was stated in regard to the blowing of dust which, if was alleged, was not essential to operation of the airport and could be controlled. Because of state statutes which in effect adopted the principle of the common law maxim regarding property rights above the surface of the earth, the court gave an extended discussion of this question. It stated that the maxim was based in a large measure on obiter dicta and that the literal terms of the statute must be discounted or qualified in like measure, adding (178 Ga. at pp. 529–530):

> But the space is up there, and the owner of the land has the first claim upon it. If another should capture and possess it, as by erecting a high building with a fixed overhanging structure, this alone will show that

> the space affected is capable of being possessed, and consequently the owner of the soil beneath the overhanging structure may be entitled to ejectment or to an action for trespass. However, the pilot of an airplane does not seize and hold the space or stratum of air through which he navigates, and can not do so. He is merely a transient, and the use to which he applies the ethereal realm does not partake of the nature of occupation in the sense of dominion and ownership. So long as the space through which he moves is beyond the reasonable possibility of possession by the occupant below, he is in free territory,—not as every or any man's land, but rather as a sort of "no man's land." As stated above, however, the occupant of the soil is entitled to be free from danger or annoyance by any use of the superincumbent space, and for any infringement of this right he may apply to the law for appropriate redress or relief.

The reasoning of these opinions, that a landowner does not own superadjacent airspace which he has not subjected to possession by the erection of structures or other occupancy, is, we submit, correct. There are, it is true, decisions which suggest that ownership of airspace extends to some particular elevation. The figure chosen is usually 500 feet because that has been established by legislation as the minimum safe altitude over non-congested areas. *Smith* v. *New England Air-*

*Craft Co.*, 270 Mass. 511; *Burnham* v. *Beverly Airways*, 311 Mass. 628; *Delta Air Corporation* v. *Kersey*, 193 Ga. 862, 869. To accept such legislation as establishing the boundary of airspace which is privately owned seems unrealistic since in many cases in the large cities, space above 500 feet has actually been occupied by buildings while in most of the country, as here, occupancy does not extend above approximately forty or fifty feet. In any event, the reasoning of those decisions would support the view that respondents did not own the airspace here involved since all flights conformed to within the minimum safe angle of flight.

Acceptance of the holding of the court below would present problems which would seriously affect the rapidly expanding air transportation business. As stated by Rhyne, *Airports and the Courts* (Nat. Inst. of Mun. Law Officers, 1944), p. 164:

> The protection of airport approaches from dangerous obstructions offers one of the most pressing of current airport legal problems. With the great increase in size and number of airplanes, and the advent of instrument landing, the need for either large airports or removal of obstructions surrounding airports is growing all the time. The rate of climb and rate of descent of larger airplanes and planes using instrument landing facilities is naturally less than that of light planes and the air-

> craft in common use several years ago. The problem of purchasing additional land to enlarge existing airports raises almost insurmountable financial objections, and the answer to the need for more space in which to land and take off from airports has been sought in the use of the police power to control the height of structures on property adjoining the airport.

Adoption by this Court of the theory of the court below would result in imposition of an extremely serious financial burden on the transportation

Cf. *United States* v. *55.23 Acres of Land, Etc.*, 55 F. Supp. 461 (W. D. La.).

## II

**Even if the Government took from respondents air space owned by them, the damages resulting from noise, lights and fear of accidents cannot be considered in assessing compensation for such a taking.**

Respondents were not making any use of the airspace traversed by the Government's aircraft. Such flights did not cause any physical damage to their property. The most that was done was to blow dead leaves from the trees (R. 10). Thus,

---

[1] In their brief in opposition (pp. 4-5), respondents assert that the planes clipped the trees and that they traveled much nearer the land than 83 feet. But the court, after finding that the minimum glide angle passed over respondents' property 18 feet above the top of the highest (65-foot) tree, stated that not infrequently planes passed over "at approximately these heights." (Finding 9, R. 8-9; see also R. 19.) Moreover, military aircraft invariably did not land or take off beyond the paved runway, so that the safe glide angle was always observed (R. 141-142, 143, 144-145, 150-151, 216).

any taking of the airspace was merely theoretical, producing no damage. Cf. *Marion &c. Ry.* v. *United States*, 270 U. S. 280; *United States* v. *357.25 Acres of Land, Etc.*, 55 F. Supp. 461 (W. D. La.). The claim for substantial compensation is based entirely on the consequences to respondents and their poultry of the noise and the lights of the planes and on the fear of accidents. For several reasons, we submit that these elements cannot be considered in determining the compensation payable under the Fifth Amendment.

A. *Damages resulting from noise, lights and fear of accidents is damnum absque injuria.*—It is well settled that damages which are the incidental result of lawful Government action are consequential and do not constitute a taking for which compensation may be secured under the Fifth Amendment. *Bedford* v. *United States*, 192 U. S. 217; *Manigault* v. *Springs*, 199 U. S. 473; *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; *Cubbins* v. *Mississippi River Comm'n*, 241 U. S. 351; *Sanguinetti* v. *United States*, 264 U. S. 146. The damages claimed here are, we submit, of this nature. As Judge Madden pointed out (R. 19–20), an apt analogy may be found in the decisions denying recovery for damages resulting from the noise, vibrations, smoke and the like, incidental to the operations of railroads. In *Richards* v. *Washing-*

*ton Terminal Co.*, 233 U. S. 546, this Court held that liability existed for the damage resulting from gases and smoke from railroad engines while in a tunnel since, by a fanning system, they were emitted over plaintiff's property. But recovery was denied for damages resulting from normal operation of the railroad. This Court said (p. 554):

> Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a "taking" within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. It includes the noises and vibrations incident to the running of trains, the necessary emission of smoke and sparks from the locomotives, and similar annoyances inseparable from the normal and non-negligent operation of a railroad. *Transportation Co.* v. *Chicago*, 99 U. S. 635, 641; *Beseman* v. *Pennsylvania R. R. Co.*, 50 N. J. L. 235, 240; affirmed 52 N. J. L. 221."

---

[11] See also *Pennsylvania Rr Co.* v. *Price*, 241 Fed. 250 (C. C. A. 3); *Roman Catholic Church of St. Anthony of Padua* v. *Pennsylvania R. Co.*, 207 Fed. 897 (C. C. A. 3); *Fink* v. *Cleveland C. C. & St. L. Ry. Co.*, 181 Ind. 539;

Thus, liability is limited to the special and peculiar damage that may result to the particular property owner. After recognizing that many states had amended their constitutional provisions to provide that private property shall not be taken *or damaged*, for public use without compensation, it was stated (pp. 554–555):

> "The immunity from liability for incidental injuries is attended with a considerable degree of hardship to the private land owner, and has not been adopted without some judicial protest. But, as pointed out by Chief Justice Beasley in the *Beseman* Case, 50 N. J. Law at p. 238, if railroad companies were liable to suit for such damages upon the theory that with respect to them the company is a tort-feasor, the practical result would be to bring the operation of railroads to a standstill. * * *"

In the instant case, respondents have not suffered any special or peculiar damage different from that of other property owners in the vicinity of the airfield. The noise from the heavy bombers would be largely the same if, rather than flying over the Causby strip, the planes had flown

---

*Atchison T. & S. F. Ry Co.* v. *Armstrong*, 71 Kan. 366; *Chesapeake & Ohio Ry. Co.* v. *Scott*, 197 Ky. 636; *Mayor & Council of City of Baltimore* v. *Himmelfarb*, 192 Atl. 595 (Md.); *Epworth* v. *Ludington & N. Ry.*, 236 Mich. 565; *Robertson* v. *New Orleans & G. N. R. Co.*, 158 Miss. 24; *Ball* v. *New York C. R. Co.*, 229 N. Y. 33; Orgel, *Valuation Under Eminent Domain* (1936) fn. 26, pp. 20–22.

over neighboring lands. The noise is simply an incident to normal take-offs and landings at the airfield. The danger of accidents which might affect respondents' lands was no greater than the danger to which other lands in the vicinity might be subject. We submit that no reason can be given why aircraft operators should be subject to liability for such annoyances as result from their legally authorized operations any more than are those who operate railroads and highways. Cf. *Smith* v. *New England Aircraft Co.*, 270 Mass. 511; *Delta Air Corp.* v. *Kersey*, 193 Ga. 862; *United States* v. *357.25 Acres of Land, Etc.*, 55 F. Supp. 461 (W. D. La.); *Warren Township School Dist. No. 7, Etc.* v. *City of Detroit*, 308 Mich. 460, 478.

It has been said that "destruction is tantamount to taking" or that "Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking", *United States* v. *General Motors Corp.*, 323 U. S. 373, 378, 384. While the Causbys alleged that their property had become uninhabitable (R. 3), they were living there at the time of trial (R. 34, 38, 41) and there were no vacant houses in the vicinity (R. 102, 181–182, 190, 193). The Court of Claims clearly did not accept the contention that the property had been rendered useless since

it made no such finding and did not award fee value (see *infra*, pp. 50–52; cf. Br. in Opp., p. 6). Thus, the most that can be said is that respondents suffered some damage from noise, lights and fear of accidents. Such damage has never been held to be a taking within the meaning of the Fifth Amendment.[12]

B. *Respondents' claim sounds in tort.*—In view of the cases dealing with the normal operation of railroads, *supra*, pp. 31–32, we believe that the damage from noise, lights and fear of accidents caused by authorized flight of aircraft should not be recoverable from private operators. *Delta Air Corporation* v. *Kersey*, 193 Ga. 862, 867–868; *Smith* v. *New England Aircraft Co.*, 270 Mass. 511, 523–524; *Pickering* v. *Rudd*, 4 Comp. 219, 221, 171 Eng. Repr. 70; Burdick, *Law of Torts* (4th ed. 1926) p. 406. But assuming to the contrary that the private operators could be charged, the liability would be in tort for the maintenance of a nuisance or the commission of

[12] This Court has stated that *Pumpelly* v. *Green Bay*, 13 Wall. 166, which holds that there was a taking when lands were completely flooded so as to destroy their value, thus effecting a practical ouster of possession, was the "extremest qualification" of the doctrine that acts done in proper exercise of governmental powers and not directly encroaching upon private property, though the consequences may impair its use, are universally held not to be a taking. *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642; *Sanders* v. *Atlantic Coast Line R. R.*, 216 N. C. 312, 315; cf. *United States* v. *Spanenburger*, 308 U. S. 256, 265; *Bracburn Alloy Steel Corp.* v. *United States*, 95 C. Cls., 343, 356.

a trespass. *Idem.* The jurisdiction of the Court of Claims embraces only cases "not sounding in tort". Judicial Code, sec. 145, 28 U. S. C. sec. 250. Hence, we submit, the court below had no jurisdiction of respondents' claim for damages. 3 Comp. Gen. 234; cf. *Schillinger* v. *United States*, 155 U. S. 163; *Sanguinetti* v. *United States*, 264 U. S. 146, 150; *Keokuk & Hamilton Bridge Co.* v. *United States*, 260 U. S. 125; *Horstmann Co.* v. *United States*, 257 U. S. 138; *Mills* v. *United States*, 46 Fed. 738 (S. D. Ga.); *Southern Pacific Co.* v. *United States*, 266 U. S. 586, affirming 58 C. Cls. 428.

C. *The so-called "severance damage" rule does not justify the award of damages resulting from noise, lights and fear of accidents.*—Having concluded that respondents owned the airspace above their property and that the assertion of the right to traverse it was a taking, the court below justified the award of damages on the theory that when a portion of a single unit of property is taken, "it is well settled that a plaintiff may recover not only the value of the part of his land which has been taken, but also the damage to the remainder resulting from the taking of a part of it" (R. 16). This holding constituted, we submit, a misapprehension as to the meaning of the rule.

In *United States* v. *Miller*, 317 U. S. 369, 376, this Court stated: "If only a portion of a single

tract is taken, the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract. Such damage is often, though somewhat loosely, spoken of as "severance damage." In *Bauman* v. *Ross*, 167 U. S. 548, 574, it was said: "When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages on that account." Thus, the rule is that consideration can be given to the fact that the severance of part of the entire tract leaves the remainder so small or in such a physical location that its usefulness is impaired. It does not mean that if there has been a taking of some property interest, damages which would otherwise be consequential can be recovered. Many decisions make it clear that this latter conclusion does not follow. In *United States* v. *Willow River Power Co.*, 324 U. S. 499, the water level had been raised above high-water mark and nominal damage was done "to land as land or structures as such" but that did not authorize recovery of power value.

In *Richards* v. *Washington Terminal Co.*, 233 U. S. 546, *supra*, pp. 31–32, the fact that recovery was granted for the special damage resulting from the forcing of smoke from the tunnel over plaintiffs' land did not authorize the recovery of damages resulting from normal operation of the trains.

See also *Danforth* v. *United States*, 308 U. S. 271, 286; *Campbell* v. *United States*, 266 U. S. 368; *Chicago, Burlington, Etc. R'd* v. *Chicago*, 166 U. S. 226; *Coleman* v. *United States*, 181 Fed. 599 (C. C. N. D. Ala.), cited in *Sanguinetti* v. *United States*, 264 U. S. 146, 150; Orgel, *Valuation Under Eminent Domain* (1936) sec. 53, pp. 176–177. And in *United States* v. *Meyer*, 113 F. 2d 387, 398 (C. C. A. 7), certiorari denied, 311 U. S. 706, the United States condemned land for the improvement of the Mississippi River. The court, nevertheless, sustained the exclusion of evidence of damages resulting from saturation, stating "Whatever defendants' remedy may be in other forms of action an interference with the subsurface drainage is not within taking under the eminent domain power." A similar conclusion was reached in *High Bridge Lumber Company* v. *United States*, 69 Fed. 320 (C. C. A. 6), where the court excluded from consideration anticipated damages to the owner's remaining land consequent upon the use to which the condemned parcel was to be put. In *Court of Marion County, W. Va.* v. *United States*, 53 C. Cls. 120, 140, the court after referring to *Bauman* v. *Ross*, 167 U. S. 548, and *United States* v. *Grizzard*, 219 U. S. 180, concluded:

> The cause of the damage to the remainder of the tract, the use to which that taken is to be put, is a cause which is entirely in-

> dependent of the mere depriving of the owner of the possession and enjoyment of the land taken and does not come within the usual rule in condemnations that the value of the land taken is to be determined by its value as a part of the entire tract.

This view is confirmed by the well-settled rule that value is determined at the date of taking. *United States* v. *Miller*, 317 U. S. 369; *Danforth* v. *United States*, 308 U. S. 271. The court below held that the date of taking here was June 1, 1942 (R. 11) which was the date of commencement of the lease (R. 6). We believe that this date is correct, for no other definite time is shown which could, with any reason, be selected as the date of taking, if there was a taking. But the damages of which respondents complain all occurred later. Since the claim is based upon the effect of heavy bombers, whether there was any damage depended upon the manner and extent to which such aircraft should use the field, if at all. Plainly, it would be pure speculation to attempt to determine these matters at the date of taking.

These considerations make it clear that respondents' claim is in essence for damages and not for a taking of property. The "severance damage" rule is not, we submit, a device whereby liability for damages can be imposed upon the Government in the guise of compensation for a taking. That such is the result of the holding below was expressly recognized in *United States*

v. *Chicago, B. & Q. R. Co.*, 82 F. 2d 131, 139 (C. C. A. 8), certiorari denied, 298 U. S. 689, where the court, taking a similar theory of "severance damage", reached the conclusion that "As already forecast, to the word 'taking' there has now been added by almost unanimous decision, bottomed on changes in the organic law, or by statutes, or by judicial interpretation in the later cases, the words 'or damaged'." See also *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161 (C. C. A. 7), certiorari denied, 302 U. S. 711; *United States* v. *Wabasha-Nelson Bridge Co.*, 83 F. 2d 852 (C. C. A. 7). This theory, that the Fifth Amendment has, by judicial interpretation, been expanded to require the payment of compensation when property is damaged as well as when it is taken, as under amendments to some state constitutions, is plainly erroneous. If this view were accepted it would effectively destroy the long-established rule that consequential damages may not be recovered. But this theory is the necessary result of a conclusion that "severance damage" means that if some small portion of property, even if of only nominal value, is taken, all damages including those which are a consequence of the Government's use of the property after the taking are recoverable. The later decision in *United States* v. *Meyer*, 113 F. 2d 387

[13] See *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–283.

(C. C. A. 7), indicates that the Circuit Court of Appeals for the Seventh Circuit recognized the error of the reasoning in the *Wabasha-Nelson* and *Chicago, B. & Q.* opinions.

This error arose from the failure to apply language in the opinion in *United States* v. *Grizzard*, 219 U. S. 180, to the factual problem involved. See *United States* v. *Chicago, B. & Q. R. Co.*, 82 F. 2d 131, 135–136 (C. C. A. 8). In the *Grizzard* case the flooding of a portion of the tract had closed a public road rendering access to the remainder inconvenient. It was in this connection that the opinion stated that damage to the remainder could be recovered "embracing, of course, injury due to the use to which the part appropriated is to be devoted" (219 U. S. at p. 183). This reference to use was simply stating that destruction of access was the result of the flooding. The Court had previously stated, "An incident of that flooding is that a public road running across the flooded land is also flooded. But if this were not so, and the roadway had simply been cut off by the interposition of the flooded portion of the farm, the damage would be the same". (*Ibid.*) The damage would also have been the same if the access had been cut off by a structure or a fence rather than by flooding. Thus, the Court was not discussing consequential damage resulting from the flooding such as erosion or saturation. Because of its nature, the value of an easement of access is necessarily determined by reference to the depreciation in value

resulting to the parcel which it serves or, if public roads are being valued, by the expense of restoring them to their former serviceability if that is necessary.[14] So also when, as in the *Chicago, B. & Q.* and the *Wabasha-Nelson Bridge* cases, *supra*, a segment of a road or railroad easement is taken, the cost of restoring the easement to its former serviceability is a proper measure when, as in the case of a main-line railroad, the damage otherwise would exceed the cost of restoration. That the *Grizzard* case does not support the decision below is apparent from the fact that it cites (219 U. S. at p. 185) *High Bridge Lumber Co.* v. *United States*, 69 Fed. 320 (C. C. A. 6.) (both opinions being written by Justice Lurton), one of the cases holding that while impairment of value to the remainder by reason of the relation of the part taken to the remainder may be considered, anticipated damages to the remainder consequent upon the use to which the condemned parcel is to be put may not enter into the award.[15]

---

[14] *Schiefelbein* v. *United States*, 124 F. 2d 945 (C. C. A. 8); *Mayor and City Council of Baltimore* v. *United States*, 147 F. 2d 786 (C. C. A. 4); *United States* v. *Des Moines County*, 148 F. 2d 448 (C. C. A. 8); cf. *United States ex rel. T. V. A.* v. *Welch*, October Term, 1945, Nos. 528–533, decided March 25, 1946; *United States* v. *Certain Parcels of Land in City of Spokane*, 45 F. Supp. 899 (E. D. Wash.); *City of Little Falls* v. *State of New York*, 198 App. Div. 488; *Matter of City of New York (Public Beach)*, 269 N. Y. 64.

[15] Similarly, while there is language in *Sharp* v. *United States*, 191 U. S. 341, that might be construed to mean that damages resulting from the use to which the Government

The decision in *Campbell* v. *United States*, 266 U. S. 368, 371, reveals that the *Grizzard* case does not have the broad meaning given to it by the court below (R. 16). In the *Campbell* case land was taken as part of a site for a plant for the production of nitrates. An award was made of $750 for the land taken and $2,250 for damage to the remainder of the property by the taking. Since the Government did not appeal, no question was raised as to the correctness of this award. The landowner appealed from the denial of his claim that, by reason of the uses to be made of lands acquired from others for the same project, his remaining lands were damaged. This damage resulted chiefly from the probability that the tract would be sold and used for industrial purposes. This Court sustained the denial of the claim, stating that (p. 371) "The proposed use of the lands taken from others did not constitute a taking of his property." Thus, consequential damages were excluded even though some property had been taken. The case is, we submit, controlling here, since the Causbys' damage did not result simply from the taking of their airspace but from the acquisition of the right to use the airfield and from the use of airspace of neighboring lands.[16]

---

might put the property was recoverable, the opinion in its discussion of three illustrations (pp. 355–356) makes it clear that the Court was not passing on the question.

[16] Since the only issue in this Court related to the damages resulting from the use of lands acquired from others, it

The absurdity of the "severance damage" rule, as applied by the court below, is well-illustrated by the facts of the instant case. It is, at best, doubtful whether any property was taken. In any event, the airspace above 83 feet had no value and the alleged taking of the easement could not sustain the jurisdiction of the Court of Claims, which does not extend to awards of nominal damages. *Marion & c Ry.* v. *United States*, 270 U. S. 280, 282. Yet, since it found that some property was taken, the court below proceeded to award a judgment approaching half the value of the property (see *infra*, pp. 49–50). No better example could be found of the fact that acceptance of this "severance damage" theory would, in practical application, nullify the well-settled rules excluding from consideration consequential damages such as business losses.

D. *In any event, the fear of accidents was not a proper consideration.*—Respondents put emphasis on their alleged fear of accidents, and in Finding 10 the Court of Claims described the four accidents that had occurred in the vicinity (R. 9). Finding 12 (R. 10) indicates that the court gave consideration to this fear in reaching its conclusion (see also R. 12). However, the court made no finding that there was actually a probability of damage to respondents' property

cannot be assumed that the *Campbell* decision would justify an award of damages resulting from the use of the parcel taken as distinguished from the depreciation in value to the remainder caused by the taking itself.

or even that there was a reasonable public apprehension thereof which would depreciate market value. Two of these "accidents" occurred at the airport and consisted of a landing with the plane's wheels up and of an abortive take-off which did no damage either to the plane or to other property (R. 9, 209–213). Of the other two accidents, the closest occurred a mile from respondents' property (R. 9). Such fear of accidents was too speculative and conjectural to be considered in awarding compensation. *Miller* v. *United States*, 137 F. 2d 592 (C. C. A. 3); *Meriden* v. *Zwalniski*, 88 Conn. 427, 433–434; cf. *Chicago, B. & Q. R. Co.* v. *Gelvin*, 238 Fed. 14, 24–25 (C. C. A. 8).

## III

**The judgment below is invalid for lack of a finding as to what property interest was taken and whether it was temporary or permanent**

The Court of Claims did not in its findings specify what property interest had been taken by the Government. Finding 14 referred to the "easement taken" and stated that the date of taking "of the easement" was June 1, 1942 (R. 11). No attempt was made to specify either a minimum permissible altitude of flight, the type of aircraft which might be flown over the land, or the frequency of flight. In Finding 11 it is stated (R. 10):

> The planes became more numerous after the Army began its operations and this situation has been continuous since that date. There is no evidence of an intention to use or of an intention not to use the airport for its heavy bombers after the termination of defendant's lease, other than the fact that defendant has the right to renew its lease only until six months after the end of the present emergency or until June 30, 1967, whichever date is the earlier.

The majority opinion, however, took the view that a permanent easement had been taken (R. 17), Judge Madden dissenting on this question *inter alia* (R. 18–19). We submit that, for several reasons, the judgment lacks both the findings and the evidence necessary to support it.

A. *Essential findings as to the nature of the property taken were not made by the court below.*—The term "easement" is not a word of art which without further specification precisely describes the rights concerned, as is the term "fee simple". For example, there are many types of easements to overflow land ranging from an easement to flood permanently to an easement to flood once in a hundred years. Thus, the term "easement of overflow" is by itself obviously too indefinite to describe a particular property interest. Cf. *Karlson* v. *United States,* 82 F. 2d 330, 333–336 (C. C. A. 8); *Smith* v. *New England Aircraft Co.,* 270 Mass. 511, 531; *Thompson* v. *Umberger,*

221 N. C. 178. Here the court below has simply referred to the interest taken as an "easement" (R. 11). Obviously, it meant easement of flight of aircraft. But, we submit, this description is meaningless when no particulars as to frequency of flight, permissible altitude, or type of aircraft are given.

A specification of the property interest taken is clearly essential in this Tucker Act suit based upon the alleged taking of property. Such description is a prerequisite to an intelligent valuation of the interest taken. And, since if there is a taking, the Government is vested with title to the property taken (*United States* v. *Lynah*, 188 U. S. 445, 470; *United States* v. *Cress*, 243 U. S. 316, 328–329), a precise description of such property is necessary: It is the duty of the Court of Claims to make findings on all material issues; hence its failure to specify the nature of the easement it held was taken was reversible error. *United States* v. *Esnault-Pelterie*, 299 U. S. 201; 205–206; *United States* v. *Seminole Nation*, 299 U. S. 417, 422; *United States* v. *Wells*, 283 U. S. 102, 120–121.

Although reference was made to the question in the opinion, no finding was made as to whether the easement had been taken temporarily or permanently. It is also well settled that the absence

---

[17] Act of February 13, 1925, c. 229, sec. 3, 43 Stat. 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752, 28 U. S. C. sec. 288.

of findings cannot be supplied by statements in the opinion. *United States* v. *Esnault-Pelterie*, 279 U. S. 201, 206; *Crocker* v. *United States*, 240 U. S. 74, 78. The statements of the majority opinion below cannot, therefore, cure the court's error in failing to find whether the easement was permanent or temporary.

B. *The evidence and findings of fact cannot support a conclusion that a permanent easement was taken.*—The lease of the United States of this airport was renewable from year to year until June 30, 1967, or six months after the end of the present national emergency, whichever should first occur (Findings 5, 11; R. 6, 10, 220). The court found that there was no evidence of an intention of the Government to use the airport after termination of the lease (Finding 11; R. 10). The opinion stated (R. 17) "Upon the expiration of its current lease on the airport defendant no doubt intended to make some sort of arrangement whereby it could use the airport for its military planes whenever it had occasion to do so." Plainly, liability of the United States cannot be founded on such speculation which is admittedly not based on evidence (see e. g., *Horstmann Co.* v. *United States*, 257 U. S. 138). As dissenting Judge Madden stated (R. 19), the Government "has been obliged to pay for a permanent right which it does not want and has no expectation of using."

Moreover, the evidence in fact contradicts the court's assumption. If permanent arrangements had been contemplated they would have been made at the time the lease was executed. With the end of the war the widespread activity of fighter and bomber planes ceased. Respondents' claim was based principally upon the flights of heavy bombers, their position being that smaller civilian planes did not greatly disturb them (R. 34–37, 52–53). Under the circumstances, the most reasonable assumption, if one is to be made, is that such activity by heavy bombers will not continue in the future. During the war, similar activities were carried on at a great many airports throughout the country. The War Department and Navy Department administered some 1262 airports which were either owned in fee or were operated under leases. The use of many of these fields was merely temporary during the hostilities and has now ceased. In connection with the acquisition of the great amount of property that was needed for prosecution of the war, it was the policy to acquire simply the temporary use rather than fee title when there was doubt whether the property would be permanently needed for military purposes. See, *e. g.*, *United States* v. *General Motors Corp.*, 323 U. S. 373; *United States* v. *Petty Motor Co.*, October Term, 1945, Nos. 77–83, decided February 25, 1946; S. Rep. No. 10, part 16, 78th Cong., 2d sess., p. 121, in connection with the

Military Appropriations Act, 1945, (Act of June 28, 1944, 58 Stat. 573). In accord with this policy, the Government acquired temporary rights to use the many airfields throughout the country. There is nothing in this record to demonstrate that the Government departed from this policy in the case of this airfield. We submit, therefore, that, absent a showing of intent to continue the activities permanently, the Government is liable only for a temporary taking. Cf. *Johnson* v. *United States*, 2 C. Cls. 391.

## IV

**The award of $2,000 is not supported by findings of fact or evidence**

Finding 14 of the court below states (R. 11):

> The value of plaintiffs' property that was destroyed and the value of the easement taken, together with the damage to the remainder of plaintiffs' property as a result of the taking of the easement, is $2,000.00. The date of the taking of the easement was June 1, 1942.

The opinion states that this was the conclusion "from all the testimony" and that a judgment "in the nature of a jury verdict will be rendered for this amount" (R. 18). This characterization makes no difference since a jury's verdict must be within the range of the testimony as to value. *United States* v. *685.2 Acres of Land in Lake County*, 146 F. 2d 998 (C. C. A. 7); *Branson* v. *Reichelderfer*, 65 F. 2d 280 (App. D. C.)

The process used by the court to arrive at its figure does not appear. If, as the Government contends (*supra*, pp. 47–49), its liability is limited to a temporary taking, the judgment is plainly erroneous since there was no evidence as to rental value.[*]

Even if the Government was obligated to pay for a permanent easement, the judgment below cannot stand. The plaintiffs' only evidence was that the fee value of their property was from $4,700 to $5,700 (R. 25–26, 32) and that the fair value of the loss of the chicken business was $1,000 (R. 38). In rebuttal, the Government presented expert opinions that the value of the property was between $2,500 and $2,885 (R. 81, 96–98, 113–114). Respondents contend (Br. in Opp.

[*] When the Government takes the temporary use of property, compensation is measured by the annual market rental value. Similarly, assuming that the Government's contention (*supra*, pp. 30–34) that damage from various elements of the noise, lights and accidents cannot be considered is rejected, compensation here should be assessed by determining the extent to which the taking of the easement has depreciated annual market rental value of the property. *United States* v. *.68 Acres of Land, Etc.*, 147 F. 2d 351, 352 (C. C. A. 2); *United States* v. *412.15 Acres of Land, Etc.*, 60 F. Supp. 576, 577 (N. D. Cal.); *United States* v. *12918.28 Acres of Land, Etc.*, 57 F. Supp. 893 (W. D. Pa.); *United States* v. *15.86 Acres of Land, Etc.*, 57 F. Supp. 745 (D. Neb.); *United States* v. *Entire Floor in Butterick Bldg.*, 54 F. Supp. 258, 259, 260 (S. D. N. Y.); *United States* v. *Certain Parcels of Land, Etc.*, 55 F. Supp. 257, 264 (D. Md.); *Johnson* v. *United States*, 2 C. Cls. 391, 415–416, 419; *Johnson* v. *United States*, 4 C. Cls. 248, 251; *Pope* v. *United States*, 26 C. Cls. 11, 13.

2, 3) that the Court of Claims adopted the process of the Commissioner in concluding that fee value before the taking was $4,000 and that after the taking it was $2,000. The dissenting opinion indicates (R. 18) that the majority adopted that process. But there was no evidence of value after the taking, let alone evidence that after the taking the property was worth only $2,000. Government witnesses testified that the airport hazard did not substantially affect market value (R. 89, 101). And E. D. Warren, one of plaintiffs' two experts, admitted on cross-examination that "the lack of available land for sale close to the airport has increased its value" (R. 30). Moreover, Warren's estimate of $2,500 value for the house was based on cost of replacement at the time of trial and he admitted that this would be $500 to $700 more than at the date of taking two years earlier (R. 29–30). Thus, the evidence contradicts the statement of the court below (Finding 12, R. 10) that respondents' property "has depreciated in value."

Moreover, the United States is certainly only liable for the decrease in value resulting from the activity of Government aircraft flying over respondents' property. It does not appear whether the judgment below was so limited or whether it also included damage from planes of others or from Government planes flying over other property. The fact is that Government

traffic represented only about ⅓ of the total traffic at the airfield (Finding 8, R. 8). Of this ⅓ only about 10% represented heavy bombers to which respondents attributed the damage (Finding 8, R. 7). Thus, the activity of which complaint was made represented only about 3% of the total traffic at the airfield. Moreover, because of the prevailing winds the runway near respondents' property was only used 11% of the time. These facts show that the heavy bombers passed over plaintiffs' property in taking off or landing on an average about once every day and a half.[13] There is nothing to show that the market value of plaintiffs' property was thereby decreased 50% (cf. Br. in Opp. p. 8).

Finding 14 refers to the value of property "that was destroyed" (R. 11). The only reference to such property is the concluding sentence of Finding 13 that "This situation has destroyed the use of the property as a commercial chicken farm" (R. 10). But it is clear that consequential damages from the destruction or loss of profits of the landowner's business may not be considered

[13] Taking the maximum figure of 1,750 take-offs and landings of military aircraft per month (R. 8), the heavy bombers would use the field 175 times per month. They would pass over plaintiffs' property only about 20 times a month. Since only 1% of the military flying took place at night (R. 135–136), heavy bombers would pass over respondents' land at night only once every five months. Therefore, these planes could not seriously disturb respondents at night (cf. Finding 12; R. 10; cf. also R. 12).

in determining the compensation payable upon a taking by eminent domain. *Mitchell* v. *United States*, 267 U. S. 341, 345; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281; *United States* v. *Petty Motor Co.*, October Term, 1945, Nos. 77–83, decided February 25, 1946; *Joslin Co.* v. *Providence*, 262 U. S. 668; *State Airport Commission* v. *May*, 51 R. I. 110, 112. While purporting to recognize this rule, the court below stated that respondents "are entitled to recover the special value of the land due to its adaptability for use for this business" (R. 18). But, except for the fact that respondents were operating a chicken business, there was no evidence that this particular land had a special value for chicken-raising purposes or that it could command an enhanced price on the market because of this special use. On the contrary, respondents' expert, Warren, rather than relying on such a special use, justified his valuation by reference to sales of neighboring lands (R. 25, 30) and stated he knew nothing about the extent of the chicken business (R. 27–28). Respondents' other expert, Miles, made no reference to any special value of the land for chicken-raising purposes (R. 30–33). Thus, there was no factual basis for a conclusion that the market value of this property was enhanced because of its peculiar adaptability to the chicken business. The award of $2,000 cannot, therefore, be supported by reference to

the loss of the chicken business. And, in any event, the Causbys' claim for loss of the chicken business was only $1,000 (R. 3, 38).

There was, therefore, no evidence upon which to base a conclusion that the value of the property taken was $2,000.00.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

J. HOWARD MCGRATH,
*Solicitor General.*
J. EDWARD WILLIAMS,
*Acting Head, Lands Division.*
ROGER P. MARQUIS,
WALTER J. CUMMINGS, JR.,
ALVIN O. WEST,
*Attorneys.*

APRIL 1946.

# APPENDIX

The following sections of the General Statutes of North Carolina of 1943 relate to rights in air space and were in effect at all times material to this proceeding:

§ 63–11. Sovereignty in space.—Sovereignty in space above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States.

§ 63–12. Ownership of space.—The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in § 63–13.

§ 63–13. Lawfulness of flight.—Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable as provided in § 63–14.

The Model Airport Zoning Act, General Statutes of North Carolina of 1943, §§ 63–29—63–37,

Laws 1941, c. 250, authorized the political subdivisions of the state to adopt, administer, and enforce airport zoning regulations and established the procedure to be followed. The public interest requiring the Act is stated in § 63–30 as follows:

> § 63–30. Airport hazards not in public interest.—It is hereby found and declared that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and is therefore not in the interest of the public health, public safety, or general welfare.

U. S. GOVERNMENT PRINTING OFFICE: 1948